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Supreme Court, U.S.
FILED
SEP 29 1959
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 346.

MRS. GLADYS LEITH HOLMES,
Petitioner,

vs.

CONTINENTAL CASUALTY COMPANY, a Corporation, MUSGROVE INSURANCE AGENCY, a Partnership, Composed of W. T. Musgrove and W. R. Cadenhead, and W. T. MUSGROVE and W. R. CADENHEAD, Individually,
Respondents.

REPLY

To Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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I.

In its brief, respondent argues first that this Court should not grant certiorari because petitioner did not argue in the Court of Appeals that the sufficiency of the evidence was to be determined by a state test. As respondent concedes, however, when the Court of Appeals decided this case it made clear that it rejected the state test and applied a "federal" one. Thus the question raised in this

petition was clearly passed upon by the Court of Appeals. The test suggested by Supreme Court Rule 19 (b) is in terms of the holding by the Court of Appeals and not the argument of the parties in that Court.

Respondent cites no authority that a petitioner must have argued a question to the Court of Appeals in order to have it reviewed by this Court. Even in considering petitions for certiorari from state courts, the question need not have been argued in the state court if the state court passed on the question.

> "Where the highest state court assumes or holds that a federal question is properly before it and then proceeds to consider and dispose of that issue, the Supreme Court's concern with the proper raising of the federal question in the state courts disappears. **Whitney v. California**, 274 U. S. 357, 360-1; **Manhattan Life Insurance Co. v. Cohen**, 234 U. S. 123, 134." Stern and Gressman, **Supreme Court Practice**, page 91 (2nd ed.).

This case demonstrates the unfairness of a requirement that a question be argued to the Court of Appeals in order to be reviewed by this Court. Petitioner believes that the evidence in this case abundantly supported the verdict of the jury under **any** test. But more importantly it would have been a waste of time to argue to the Court of Appeals that the well established rule of that circuit was erroneous. The Court of Appeals was not going to reverse an unbroken line of its decisions extending back for twenty years or more because of an argument by petitioner.

Respondent concedes the crucial fact that the Court of Appeals rejected the state test for determining sufficiency of the evidence and applied a federal one. It is this action by the Court of Appeals which is sought to be reviewed.

II.

The second argument of respondent is that the decision below was correct because this Court, the Fifth Circuit and the Fourth Circuit, have always refused to apply the scintilla of evidence rule. The decisions of this Court which it invokes are all prior to **Erie v. Tompkins**, 304 U. S. 64, and, therefore, are not in point.

Respondent is correct that the Fifth and Fourth Circuits reject the scintilla rule. But they do it because they are among the Circuits which insist that the sufficiency of the evidence is determined by a federal rather than a state standard. They have not carved out a special rule under which the scintilla test is ignored. For example, the Fifth Circuit in **N. Y. Life v. Sparkman**, 101 F. 2d 484, 485, states:

> "We do not agree with appellee that if there is a different rule in Florida for determining whether the evidence is sufficient to take a case to the jury than that obtaining in the Federal courts the Federal courts would be bound by it, for the question of whether the evidence makes an issue for a jury is one to be determined by the Federal courts by their own processes of reasoning and conclusion, and not according to any rule of standard which may be fixed for doing it by statutes or decisions of a state." And see **Ling v. Edenfield** (5 C. A.), 211 F. 2d 705. For a statement of this same rule from the Fourth Circuit see **McSweeney v. Prudential Ins. Co.** (4 C. A.), 128 F. 2d 660.

In the **Sparkman** and **McSweeney** cases the questions did not involve the scintilla of evidence rule. They involved questions very similar to the one presented in **Dick v. N. Y. Life**, 359 U. S. 437. It is obvious, therefore, that the Fourth and Fifth Circuits are in conflict with the Second, Third and Sixth Circuits on the basic question of

whether a state or federal test should determine the sufficiency of the evidence. The scintilla rule is merely one instance where these two circuits refuse to apply state standards to determine sufficiency of the evidence.

Cases from other circuits illustrate that they too have the problem of whether to apply a state or federal standard in determining sufficiency of the evidence, even though a scintilla rule is not involved. For example, in **Gutierrez v. Public Serv. Co.** (2 C. A.), 168 F. 2d 681, the Court of Appeals held that in a diversity case the sufficiency of the evidence was determined by the law of the forum state of New York and, therefore, the plaintiff had to show a **rational** basis for selecting his hypothesis over inconsistent ones pursuant to New York law rather than merely a possible hypothesis for a verdict which was the alleged federal test. And in **Rytex v. Ryan** (7 C. A.), 126 F. 2d 952, the Seventh Circuit held that it was bound to weigh the sufficiency of the evidence in a trademark infringement case according to the state test which required proof to be by "a clear preponderance of the evidence." And in ..... Moran v. Pittsburgh Steel, 166 F. 2d 908, the Court held the state standard for determining proof of proximate cause applied.

Of course it is not necessary for this Court to decide on a case by case basis whether the federal or state test is the proper test for proof where the issue might be trademark infringement, circumstantial evidence, proximate cause, contributory negligence or scintilla of evidence. This Court can and should, as was recognized in the **Dick** case, resolve the present conflict in the Circuits and lay down a clear rule for guidance of federal courts as to whether a state or federal sufficiency of the evidence test is applicable in diversity cases. This will resolve not only the problem with reference to the scintilla rule but the other problems that arise with reference to the state or federal test for determining sufficiency of the evidence.

We think this Court in **Stoner v. New York Life**, 311 U. S. 464; and **Guaranty Trust Co. v. York**, 326 U. S. 99, has already indicated that the state test is the one to be applied except where the state rule conflicts with the federal policy favoring jury decisions or infringes on the guarantee of the Seventh Amendment. **Byrd v. Blue Ridge Cooperative**, 356 U. S. 99. Plainly the Alabama scintilla rule implements rather than conflicts with the federal policy favoring jury decisions.

Respondent urges that the Court of Appeals properly denied petitioner a trial by jury even though she was assured of one in the state court because the Alabama scintilla rule would be time consuming and would unduly burden federal courts. It does not work out this way in the Alabama courts, nor would it in the federal system. Respondent complains that the scintilla rule in Alabama requires a new trial rather than a directed verdict, but this Court has itself commended as better practice the remanding of a case for a new trial than having an appellate court enter judgment. **Cone v. West Virginia Paper Co.**, 330 U. S. 212, 215.

If time and expense were the only considerations, a new trial would never be granted where the appellate court is of the opinion that the evidence does not support the judgment. Jury trials are themselves time consuming and expensive. This Court has never equated the saving of time with its obligation to protect and make meaningful the guarantee of a right to a jury trial. The Alabama scintilla rule gives substance and effect to the guarantee of trial by jury.

There is no merit to respondent's argument that the application of the scintilla rule in federal courts will create problems under Title 7, Section 277, Code of Alabama (1940), which provides that "no more than two new trials can be granted the same party in any cause." In **Doe v. Finnegan**, 216 Ala. 431, 113 So. 277, the Alabama Supreme

Court discussed similar statutes in some **nine** other jurisdictions, and stated:

> "The obvious meaning of our statute is that no more than two new trials can be had on the merits and the same issues of fact, where such issues are fairly presented and left to the trier's of fact upon proper evidence and instructions, and there being legal evidence before the court to support the verdict or judgment rendered . . ."

This statute limiting the number of new trials in Alabama and the similar statutes in many other states are either applicable or inapplicable in federal courts without regard to the scintilla rule.

Under Alabama and federal practice, the trial judge has the power to set aside verdicts where the mere weight of the evidence is insufficient. If the verdict in this case had been viewed by the trial judge as against the weight of the evidence, petitioner would have been granted a new trial, but because the trial judge viewed the evidence as so strong that he overruled the new trial motion, respondent appealed and an appellate court viewed a cold record and ordered judgment for respondent. It is anomalous that if petitioner's evidence had been weaker, she would have been granted a new trial by the trial judge and respondent would not have appealed. We submit the Alabama scintilla rule is in accord with the policy of this Court. What violates the policy of this Court is the action of the Court of Appeals in denying this petitioner the jury trial assured her under state practice and under circumstances where the trial judge believed the evidence was too strong even to grant a new trial. Certainly there is nothing about the Alabama scintilla rule that would require this Court to make an exception of the rule for which we contend, i. e., that federal courts in diversity cases should apply a state test in determining the sufficiency of the evidence.

III.

Respondent relies on **Byrd v. Blue Ridge Cooperative**, 356 U. S. 525, which cited **Herron v. Southern Pacific Co.**, 283 U. S. 91, for the proposition that the scintilla rule of Alabama should not be allowed to disrupt the "judge-jury relationship" in Federal courts so "as to prevent such courts from bringing litigation to a conclusion in as expeditious manner as allowed by Rule 50 (b)."

We agree that there should be "a strong Federal policy against allowing state rules to disrupt the judge-jury relationship in the Federal courts." Particularly is this so, when, as in **Byrd**, the state rule converts a normal fact question into a question of law with overtones of infringement on the scope of the Seventh Amendment. See also the analogous situation in **Gibson v. Phillips Petroleum Co.**, 352 U. S. 874.

However, we cannot understand how the "judge jury relationship in the Federal Courts" can be disrupted by following the scintilla rule of Alabama. Neither can we see how the exercise of Rule 50 (b) by appellate courts can be hampered at all by following the scintilla rule.

This Court has taught that federal courts in diversity actions should apply the state rules on burden of proof, which directly affect whether or not the issue will go to the jury. **Palmer v. Hoffman**, 318 U. S. 109, 116-7; **Cities Service Oil Co. v. Dunlop**, 308 U. S. 208. As we understand **Stoner v. New York Life Ins. Co.**, 311 U. S. 464, this Court there directed that the Federal courts apply a state standard for determining the sufficiency of evidence to support a jury verdict—it appears that the Fourth and Fifth Circuits have ignored the mandate of **Stoner**. Likewise, in many instances federal rules of procedure have yielded to state rules of procedure which affect substantive rights of parties. See **Ragan v. Merchants Transfer &**

Warehouse Company, Inc., 337 U. S. 530 (Rule 3); **Woods v. Interstate Realty Co.**, 337 U. S. 535 (Rule 17b); **Cohen v. Beneficial Industrial Corp.**, 337 U. S. 451 (Rule 23). The total import of these decisions is an assurance of uniformity of result under the rule of **Erie.**

Though confronted with the **Palmer, Dunlop, Stoner, Ragan, Woods** and **Cohen** decisions, the Courts of Appeal for the Fourth, Fifth and possibly Tenth Circuits have applied federal rather than state rules for determining the sufficiency of the evidence to support a jury verdict.

The question, of course, as posed by this Court in **Guaranty Trust Co. v. York**, 326 4-5-99, is whether there will be a substantially different outcome if the Federal courts reject the state scintilla test. The answer is obviously yes. In the few cases where the scintilla rule would apply, the trial court could not direct a verdict or enter a judgment notwithstanding the verdict if a scintilla of evidence was present. The appellate court, as in the case at bar, would be precluded from rendering the case for an appellant where a scintilla of evidence existed. The remedy would be a new trial. Clearly, a new trial in lieu of an adverse judgment in such a situation is a substantial right afforded by Alabama courts.

The purpose of Rule 50 (b) would be no more frustrated or hampered by federal courts applying the scintilla rule than were Rules 3, 17 (b), and 23 affected by following state practice in **Ragan, Woods** and **Cohen**, supra.

Respondent argues that an adoption of the scintilla rule would disrupt the "judge-jury" relationship in Federal courts, but the only effect of this rule would be to grant an appellee a new trial rather than permitting judgment to be rendered against him. This rule would, therefore, implement rather than disrupt the "judge-jury relationship" which this Court stated in **Byrd** it was seeking to

foster. Also it would retard further encroachments on the Seventh Amendment and would further the better practice of granting new trials as outlined in **Cone**.

IV.

Respondent asserts that the constitutional question of whether the Court of Appeals could reverse this case because of an insufficiency of the evidence has been foreclosed by a number of decisions of this Court. The cases on which respondent relies for this proposition were not even cases where an appellate court was reversing the trial court. They were cases where a trial judge had directed a verdict.

But petitioner is not arguing in this reply petition, the abstraction of whether a federal court has the power in a proper case to reverse and render for insufficiency of the evidence. (Certainly the better practice would be to remand the case for a new trial where the trial judge believed the evidence too strong to even grant motion for new trial.) Petitioner is contending that the technique of the Fifth Circuit in this case renders the Seventh Amendment meaningless. This Court is not required to search the record to determine manifest error because sufficient evidence is recited in the Court's opinion.

The Court of Appeals simply substituted its view for that of the jury—even in determining the credibility of conflicting testimony. For example, respondent's own office memorandum, Exhibit 13, categorically referred to the Musgrove Agency as a general agency. In conflict with this evidence was the testimony of Holland which sought to explain away this admission. Apparently neither the jury nor the trial judge was impressed with Holland's testimony. But the Appellate Court in reviewing a printed record denied any evidentiary weight to respondent's admission by stating that "Holland testified unequivocally."

If the Seventh Amendment means anything, it means that conflicts in the testimony are for the jury.

Professor Wright in his article **The Doubtful Omniscience of Appellate Courts**, 41 Minn. Law Review 751, points out that appellate courts "are inventing new procedural devices by which the mastery of the litigation process can be made direct rather than devious," and by which "unwise or unwanted" jury verdicts can always be rejected.

We are aware that the cry "violation of Seventh Amendment" is overworked, but the technique employed by the Fifth Circuit in this case makes an empty ritual of any trial by jury. In all earnestness we submit that without a look at the record of this case and on the opinion of the Court of Appeals alone, this Court should categorically reject this newest procedure of the Fifth Circuit for nullifying the verdict of the jury.

Realistically, and as a practical matter, this Court must know that not always as here will the agent come before the jury and admit that he was appointed a general agent. It is not always, as here, that discovery will uncover a carbon copy of the application labelling him a general agent. In the usual case all that the ordinary citizen can ever expect to produce is the evidence which the Alabama cases have always said was enough:

1. That the agent solicited insurance;
2. That the agent countersigned and issued policies;
3. That the agent received and collected premiums.

United Burial v. Collier, 139 So 104, 139 S. 106, and Alabama Code 1940, Title 9, 68, 69 and 73, say so.

If this opinion stands, any insurance company similarly situated wishing to repudiate the authority of the agent, who is **without a written agency contract**, has only to cite this decision and avoid the payment of its obligation.

If that is not true, we simply would not know how to tell a widow to collect her insurance.

Respectfully submitted,

.....

FRANCIS HARE,

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TRUMAN HOBBS,

Counsel for Petitioner.

Certificate.

I hereby certify that a true copy of the foregoing brief has been served upon Messrs. Lange, Simpson, Robinson & Somerville, attorneys of record for respondent, Continental Casualty Company, and I further certify that a true copy thereof has been served upon Messrs. Mitchell and Poellnitz, attorneys of record for respondents, Musgrove Insurance Agency, a partnership composed of W. T. Musgrove and W. R. Cadenhead, and W. T. Musgrove and W. R. Cadenhead, individually.

This the ... day of ....., 1959.

.....

Truman M. Hobbs,

Of Counsel for Petitioner,

Mrs. Gladys Leith Holmes.